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This study of a court decision on public school desegregation notes the importance of the case, In re Skipwith, as a test of the relationship of the Fourteenth Amendment to school assignment to a defacto segregated school. The background of the controversy is presented. A summary of the case includes the parents' defense against charges by the Board of Education of child neglect, the arguement of the Board, and the court's opinion. The court ruled that the parents were justified in keeping their children out of an inferior school on the grounds that they were denied equal protection of the laws (under the Fourteenth Amendment) at their local school. The precedent-setting nature of the case is discussed in relation to its ramifications for the entire issue of school desegregation and educational equality. (NH)

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School Desegregation and the Law in New York City: The Case of In re Skipwith

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PREFACE

It is hard to determine the legal imperatives of public school desegregation without being familiar with some of the more important court decisions in the field. In re Skipwith clarifies the relationship of compulsory assigning of teachers, and actions of self-help by parents, to the 14th amendment of the United States Constitution. Our study appraises this legal aspect, and explores the repercussions of the adjudication on policy-making in education as well. Our report, therefore, should be useful to practioners and decision-makers in the field of public education, and to those interested in learning more about the role of a metropolitan judicial institution in effecting further desegregation of our urban schools.

Of late, the question of parent and community involvement in the urban schools has become focal. And this case shows clearly how parents and community became involved in the education of their offspring years before the decentralization question was brought to the public. The parents demanded and sought quality integrated education, a slogan that many white professionals held out to them, and a goal that these parents dared to reach for.

We are not legal experts, although we were ably assisted by

lawyers. We are social scientists, trained to see a social issue--what caused it, what events led up to it, what actually occurred, and what are the immediate and long-range consequences. Law adds a significant dimension when one tries to see the social situation and to understand all sides of an issue. Law is evolutionary and seemingly conservative. Although the road leading up to the 1954 Supreme Court decision on desegregation was slow and tortuous, still the decision was heralded, for it stamped new attitudes and behavior into the minds of all. So it is with this case. New thinking replaces old, and new expectations and perhaps new behavior may be the result. For all these reasons, we found the Skipwith case worthy of our time and effort.

While we alone are the authors, even a report of this brevity would not have been possible without the assistance of others. We are grateful to Thomas P. Raynor, who shared with us his knowledge of policy formation and the political process. Certainly the encouragement of this teacher and friend contributed greatly to any merits of our study. We were assisted in those portions of the study that concern reference to legal procedures by the critical comments of Michael Ross, and at the Center for Urban Education by Mort Inger. We acknowledge other Center colleagues who shared

their expertise with us. They include Stanley Lisser, Dorothy Christiansen, and Dan Wood. We thank also the school personnel, the lawyers and the parents involved in the Skipwith litigation, who allowed us to interview them and who freely shared their recollections with us. None of the above persons, however, are responsible for those faults which remain.

Special thanks go to Lynette Morris, Pauline Garvin, Dolores Murdaugh, and the other support personnel.

And lastly, we wish to gratefully acknowledge the patient and diligent editorial work of Bonnie McKeon.

May 1968

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I.

INTRODUCTION

Almost ten years ago, the New York City Board of Education brought legal proceedings against parents who refused to send their children to assigned local junior high schools. This case, In re Skipwith,[1] was decided by Judge Justine Wise Polier of the then Children's Court of the City of New York in December, 1958. An appraisal of her lengthy opinion permits us to observe how the judicial machinery has responded to problems that arise when Negro parents, living in a Northern city that has de facto segregated schools, willfully disobey the state's compulsory education attendance law.

The Children's Court, in rendering the opinion, concluded that the parents had a constitutionally guaranteed right to choose no education for their children rather than to subject them to a segregated education which was inferior; and that the Board of Education's claim that the parents should be punished for their action had insufficient legal support. The Court noted, however, that it was not called upon to decide how the Board should provide equal educational opportunities for all New York school children. Both litigants were willing to forego their rights of appeal to the Appellate Division of the New York Supreme Court.

Why the Case Warrants Attention

Though this case has not received much attention by

students of the American political process, or by practitioners in the field of public education, it seems worthy of investigation for several reasons. The Brown decision in 1954, which held that segregation in public education was inherently discriminatory and unconstitutional, endowed with legal sanction in American constitutional law the proposition that Negro children could be provided with equal educational opportunities only in an integrated school setting.[2] Since this landmark decision, the Supreme Court has assiduously noted the illegality of de jure segregated schools; it has been less articulate, however, on matters concerning de facto segregated schools.[3] The unsettled legal status of continued adventitious segregation in the schools involves the broad question of how far school boards should go in rectifying long-neglected social injustices. Does the federal constitution require desegregation of schools when segregation is the result of discriminatory real estate practices and cultural homogeneities, but not of intentional policies of public education institutions?[4] What is the status of compulsory education laws when de facto segregated edution is a factor? Of what relevance are the professional qualifications of ghetto teachers? How extensive is judicial review of decision-making in public education institutions? What legal means have parents, who live in segregated communities, for providing better educational opportunities for their children? And under what circumstances may they elect no education for their children rather than subject them to an inferior one? Though the Skipwith

opinion does not provide comprehensive answers to all of these questions, the case does offer important clues as to how courts may respond to these issues.

The case may also set a precedent for the judiciary's reaction to future acts of civil disobedience. Because of frustration in their attempts to effect change in the educational facilities, and possibly encouraged by the increased visibility of Black Power spokesmen, community patience with inferior public schools seems to be deteriorating. Since the Skipwith litigation, proponents of improved segregated schools have become more vocal and militant. In 1964 there were massive boycotts by schoolchildren, and more recently there have been demands by irate parents to be given powers of teacher selection and administration in the ghetto facilities.[5] The courts may be faced with even more school boycotts and child-neglect petitions in the future. Skipwith would be of obvious relevance to these deliberations.

Another reason for looking at the decision is that it contributes to an understanding of the struggle for integration in New York City schools. Skipwith provides a documented history of the school deficiencies that existed during the early period of the integration controversy. Knowing this, we may be in a somewhat better position to speculate on how the community sees their substandard schools and why there is increased hostility toward the conventional education system.

The Background of the Controversy

In 1957 the Board of Education set the comprehensive goal of providing integrated education for the children of New York City. By the following year, however, the Board began to come under criticism for inaction and delay from its own Commission on Integration and from civil rights groups and other civic organizations.[6] Simultaneously, parents' groups in the Harlem and Bedford-Stuyvesant communities were urging the Board to provide better education for their children. Their activities included holding rallies, meeting with school officials, threatening school boycotts, and even initiating an unsuccessful legal action against the Board of Education. The parents wanted newer school facilities, and they were interested in rezoning and student transfers for effecting integration.[7]

Two such parents' groups in adjacent housing developments in Central Harlem had been working together for two to three years prior to the Skipwith decision.[8] One group lived in a low-income public housing project, one of the earliest built in the city. Many of the parents were middle class in social background and education, yet they were eligible for residency because they had large families. The other parents' group lived in a privately built middle-income project across the street.

In the fall of 1958, the children in the area were assigned

by the Board to attend two junior high schools in Harlem. These two schools had reputations in the community for having transient teaching staffs, being overcrowded, and serving as feeders to nonacademic high schools. Some parents went to the schools and spoke with school personnel, and their suspicions were confirmed.[9] The possibility of a collision between the parents and the Board of Education over the assigning of their children to these schools was increased by yet another development. Local school authorities in the fall of 1958 had extended a transfer program which allowed children from and near the Harlem area to attend an integrated junior high school in a predominantly white area. Though the program was extremely small (and with transportation being provided by the Negro parents), and stemmed in part from a transfer plan begun two years earlier at a local overcrowded elementary school, many parents in the public project heard of the plan. It became their impression that in their area the participating children came from the middle-income project, and that their children, in turn, were being excluded.[10] At this point some parents from the public project decided to keep their children out of school. In late October, Stanley and Bernice Skipwith and Charles and Shirley Rector were cited for neglect of their children in petitions filed with the Children's Court by the Board of Education. The Court decision of December 15, 1958 arose from this litigation.

II. A SUMMARY OF THE CASE

In describing Skipwith, we shall follow, in general, the format used in the opinion. After summarizing the contentions of both sides, we will provide an account of the reasoning used by the Children's Court in reaching the various holdings that together comprise the opinion. Because the objective of this section is to show the positions of the respondent and plaintiff as a prelude to discussion of the opinion, and because these arguments are also discussed by the Court, they will be stated here as briefly as possible.

The Defense of the Parents

The parents' justification for refusing to send their children to the designated schools is that the children were being denied standard educational opportunities in those schools,[11] in violation of the equal protection clause of the 14th amendment.[12] In addition, the parents contend that by forcing their children to attend such schools, the Court will be violating the same amendment as well.

The respondents stress two features of the Harlem school system to support their argument. The first is that their schools are segregated, and the second is that between these schools and those attended predominantly by white children there exists wide disparity in teachers' experience and professional qualifications. The parents, noting that this inequality is in favor of the white school populations, contend that the Board allowed this development to occur and therefore is legally responsible.

The Argument of the Board of Education

The Board takes the view that the parents' actions should be judged by precedents, and bases its argument on cases that have arisen in compulsory school attendance litigations. Its brief is limited to supporting this position and, consequently, does not provide any clues to its attitude on the quality of ghetto education.

The plaintiff contends that the Court does not have jurisdiction to consider the constitutional issues raised by the parents since such questions must be addressed to the New York State Commissioner of Education. The only legal justification for keeping children out of school, according to the Board, is either that their absence is a result of illness or that alternative educational arrangements have been provided. However, since the parents acknowledge that they have refused to send their children to public schools for other than these reasons, the plaintiff reasons that it is justified in initiating neglect proceedings against them.

The Board bases its position upon interpretations of state laws as well as adjudications of courts. A provision of the New York State Education Law is cited as the basis for claiming that the respondents do not have legal standing to raise constitutional issues in a court of law.[13] According to the plaintiff's interpretation of this statute, persons who are aggrieved by actions or policies of school boards must seek redress from the Commissioner. Since this was not done, the Board argues that the parents are violating the state's compulsory school attendance laws.[14] Several cases are cited by the Board to define the limits of exemption under this law.

The cases cited hold public school nonattendance lawful when children's absence is caused by poor health, hazardous travel conditions, or a situation where alternative education has been provided through private facilities.

Most of these cases were decided in county children's courts. Some, however, were appealed to the appellate level of the State Supreme Court. The plaintiff cites People v. Himmanen, in which the Chemung County court in 1919 held that the only legal exemption from compulsory school attendance occurs when children are "not in proper physical and mental condition to attend school."[15] In the Conlin decision of 1954, the Board adds, a children's court in Nassau County, New York, ruled that since alternative education had not been provided, a father must send his children to public school, even though they had to cross an unattended railroad crossing.[16] Next cited is Matter of Myers, which is an opinion given by Judge Polier in 1953.[17] In this case neglect proceedings were dismissed after it was shown that a child was receiving adequate instruction at home. The plaintiff notes that the judge had declined to rule on the parents' contention that the assigned public schools were hazardous because of unsanitary conditions. In the Richards decision of 1938, the Board adds, the Appellate Division of the New York Supreme Court excused a child from attending public school since dangerous travel conditions existed and since a parent was competent to be a tutor as well.[18] The plaintiff also mentions DeLease v. Nolan, in 1918, in which

a judge on the appellate level upheld a truant officer for forcibly escorting a child to school although a parent consented without cause to the child's nonattendance.[19] And in the Weberman case of 1950, which concerned a custody clash over a son, the Board notes that the Appellate Division again held that a father must provide his child with a secular education in the basic education subjects if he wishes to retain custody.[20]

Under these judicial precedents, the plaintiff contends, the reason offered by the Harlem parents does not qualify their children for exemption from the compulsory school attendance law. The plaintiff concludes that it is justified in asking the Children's Court to hold the parents punishable for child neglect under its existing statutory authority.[21]

The Opinion of the Children's Court

The decision of the Court is that because, relative to white schools, the segregated Negro and Puerto Rican schools are staffed by large numbers of substitute teachers whose teaching qualifications are inferior to those of regularly licensed teachers, the respondents' children are denied equal protection of the laws under the 14th amendment at their local schools. It is also held that the Board of Education can not justify delay in rectifying this staffing inequality for financial reasons, and that the Children's Court will not sanction proceedings against parents who refuse

to send their children to these poorly staffed schools even though the children are not receiving alternative teaching elsewhere.

Judge Polier decides first that the Court has the right to review the parents' complaints even though there was no prior appeal to the Commissioner of Education. After reviewing the penal code provisions concerning child neglect, Skipwith states that in essence the plaintiff is urging the Court to remove the Skipwith and Rector children from their families, and fine and imprison their parents if they continue to refuse to send them to assigned junior high schools. Judge Polier says the Court will not uphold this right of the Board without considering the constitutional defenses offered by the parents for their action. Judge Polier says:

> ...The Board of Education contends that one arm of the State - this Court - must blindly enforce the unconstitutional denial of constitutional rights by another arm of the State - the Board of Education. Such a proposition is abhorrent to the American doctrine of supremacy of the law. It is utterly shocking to the conscience of a Justice of a Children's Court established to promote the health and welfare of children. Only the clearest of legislative mandates or the plainest of judicial precedents would compel this court to such a holding. None do so. The holdings of the courts of this state are to the exactly opposite effect, and the decisions of the Supreme Court of the United States are clear that any other holding would itself deny the due process of law also guaranteed by the fourteenth amendment. [p. 329]

Upon reviewing previous adjudications, the Court finds no judicial precedents for denying the parents their right to raise constitutional questions. Adjudications both from

the state and federal levels are surveyed in upholding this view.

In reviewing the cases cited by the plaintiff, Skipwith states that none supports the argument that the Court lacks legal authority to consider the issues raised by the parents. It is noted that these earlier cases neither involved constitutional questions nor included references for exclusive review by the Commissioner of Education. Skipwith adds that in the Donner case, which was not cited by the Board, a father argues on constitutional grounds for his refusal to remove a son from religious school.[22] His position was considered by the courts and overruled on its merits. Judge Polier notes that no stipulation was made in this decision or in those mentioned by the plaintiff for review by the Commissioner.

Skipwith also cites several instances in which it has been argued unsuccessfully in the courts that grievances arising from school policies must first be reviewed by the Commissioner. Although these cases concerned teachers rather than pupils, their significance for Skipwith is that the rights of the aggrieved persons were derived from statutes. These statutory rights, observes the Court, are lower in importance than those guaranteed by the 14th amendment. Judge Polier cites the Frankle decision of 1940, which concerned teacher employment policies, as an example of

rejection by the courts of the Board's contention that the Commissioner has exclusive review over its policies.[23] In this legal proceeding a New York City teacher successfully challenged the Board for not making mandatory appointments from its eligibility list. Three other cases are also cited which uphold this right of judicial review in teacher appointments.[24]

In addition, Skipwith notes that, in the Cottrell case of 1943, the courts affirmed the right of a teacher to seek redress through the courts when the Board eliminated certain salary increments.[25] And in Moses v. Board of Education of City of Syracuse, the opinion observes that the Appellate Division of the New York Supreme Court rejected an argument that a teacher's sole remedy for opposing alleged discriminatory salary schedules was by appeal to the Commissioner.[26] Also, though the higher Court of Appeals of New York reversed the Moses decision on the basis that the plaintiff failed to prove that discrimination existed, Skipwith adds that the members of that state tribunal, which included Benjamin Cardozo, Cuthbert Pound, and Irving Lehman, "would hardly have passed over without mention the claim of exclusive administrative remedy, if the assertion had even merited consideration" (p. 333).

Having established that direct judicial review of Board of Education policies extends to those in teaching positions, Skipwith notes that this protection has been

afforded to others as well. Three cases are mentioned as legal authorities. The first two are decisions that arose from conflicts between specific school board policies and affected citizens. The third one concerns public administrative prerogatives and individual liberties. The first litigation resulted in an Ulster County court overruling the school board of Albany, New York, for canceling vocalist Paul Robeson's permit for use of an auditorium after the board learned of the artist's alleged political opinions.[27] Judge Polier, quoting from this case of 1947, notes that the statutory provision for appealing to the Commissioner of Education was "permissive and not mandatory....it is not the exclusive remedy of an aggrieved person" (p. 333). The second case cited is Ellis v. Dixon.[28] In this 1953 decision, the Appellate Division affirmed the discretionary authority of the Yonkers school board to deny use of its facilities to a local peace group. This tribunal, continues Skipwith, specifically disputed a lower court's assertion that aggrieved individuals have the exclusive remedy of appeal to the Commissioner.[29] In concluding that the state education statute is no barrier to judicial review of public school policies, the Children's Court also mentions a case decided by the United States Supreme Court.[30] In the 1945 Estep decision, Skipwith notes that it was held a violation of due process of law when judicial review was not accorded to administrative commands which affected individual liberties.[31]

Skipwith further notes that the Court is called upon not by parents to end unconstitutional educational practices, but rather by a board of education to sanction policies that may be unconstitutional.[32] The Court, therefore, holds that it would be violating the federal constitution if it did not thoroughly consider the parents' contention. Four previous adjudications are cited in emphasizing the imperativeness of this view. First, the 1957 Dobbins case, in which the highest state court of Virginia held that Negro parents could not be punished for refusing to send their children to segregated schools, is cited as an example of a compulsory education statute being set aside when constitutional guarantees were raised.[33] Judge Polier adds that "one must experience regret that the Board of Education of the City of New York should suggest that the courts of this State be less solicitous of the rights of its citizens" (p.334). Second, Skipwith observes that in the Cooper decision, in the early fall of 1958, the United States Supreme Court held that unconstitutional educational conditions must be remedied with "all deliberate speed."[34] Judge Polier, noting that the Harlem parents do not seek a court order directing the Board to eliminate alleged inequality in the schools, adds that if such were the situation, a court might well hold, in light of this Little Rock case, that for New York City "all deliberate speed" means "action instanter" (p.334). Skipwith then mentions two other Supreme

Court cases in concluding that it must consider the constitutional questions raised by the parents. Both hold that a state would be violating the constitution if it enforced restrictive covenants that discriminate against Negro citizens.[35] Judge Polier ends the survey in this section by holding:

> This Court, I conclude, has the duty to consider upon the merits the constitutional issues presented by these parents in defense of their conduct* and, if the defense is sustained by the facts this court must dismiss the proceeding against them. /p.335./

(It must be observed that the opinion does not examine whether acceptable alternative education is provided for the children, though Skipwith does note that arrangements have been made for some private tutoring. Since this was not offered as a defense by the parents, the Court does not, however, consider it relevant to the opinion.)

Having thus established the basis for judicial review Skipwith proceeds to consider the issues presented by the parents. (It is well to emphasize that the Court is not concerned with the legality of de facto segregated schools as such, but only with the legality of segregated education in New York City.) In describing this section of the opinion, we shall first note the holding and then discuss the

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*"Accordingly the court now overrules those objections made by the Board of Education to admission of evidence on this issue and on which decision was reserved at the hearing." (p. 335, n.4)

legal interpretations and factual data employed by Skipwith in arriving at the holding.

The first question Skipwith asks is whether ethnic segregation exists in the junior high schools of New York City and, if so, whether it is in violation of the 14th amendment. The holding is that school segregation does exist, but it is the consequence of adventitious residential patterns and is not attributable to any discriminatory governmental actions that affect school zoning, pupil assignments, or school construction sites. That part of the parents' defense is not justified, Skipwith therefore declares, which claims that ethnic segregation in the schools results from purposive Board policies.

In determining the extent of this segregation and the plaintiff's responsibility for its development, the opinion cites pupil enrollment data presented by the Board during the hearing, as well as two previous federal adjudications. Reviewing the enrollment information Skipwith notes that the only junior high schools in the city whose student populations are 100 per cent Negro and Puerto Rican are the two schools where the respondents' children are assigned. One school has 98.4 per cent (1,560) Negro and 1.6 per cent (25) Puerto Rican children, while the other one has 98.5 per cent (1,629) Negro and 1.5 per cent (25) Puerto Rican children. The Court observes that there are seven

additional junior high schools in which the student populations are over 95 per cent Negro and Puerto Rican and 40 schools where they are under 5 per cent. It is noted in the opinion that when the 127 junior high schools in the city are classified into those groups that have Negro and Puerto Rican student populations of over 85 per cent and those that have less than 15 per cent, 16 schools fall in the former category and 52 in the latter one. Though de facto segregation clearly exists, Judge Polier holds that no showing is made that it is the result of discriminatory Board policies. Two federal adjudications are then cited in upholding the view that when governmental action based on ethnicity is not a factor, de facto segregation is not in violation of the equal protection clause of the 14th amendment. Skipwith mentions a litigation where a federal district court in Michigan held that school segregation that results from residential patterns is not unconstitutional since the selection of a particular school site was based on population density and not on ethnicity.[36] The Court notes, however, that a contrary conclusion was arrived at by the Court of Appeals for the Fifth Circuit where segregated schools in Palm Beach, Florida, were found to be unconstitutional since residential segregation was enforced by a local ordinance.[37] (Though distinguishing these segregated school cases on the ground that the former occurred through private action and the latter resulted from a state action which zoned neighborhoods racially, Skipwith does not seem concerned with the fact

that in both instances, state action also exists in the boards' daily operation of the schools.[38])

Before answering the parents' other major contention--that their teachers are less qualified than those in white schools--Skipwith notes that if this should be true then "a terrible injustice is done to children who already have to suffer the blighting effect of segregation" (p. 336). By reviewing declarations by the Board and testimonies of expert witnesses summoned by the parents, Judge Polier concludes that it would be illusory for an educational institution to speak of handicaps imposed on children in segregated schools, while not attempting to provide teachers who at least are equal in qualifications to those in white schools.

On the issue of educational disadvantages being inherent in segregated schools, Skipwith notes that in 1954 it was stated by the New York City Board of Education that the Brown case had been a reminder that segregated education adversely affects the personality, motivation, and learning ability of Negro children and therefore is contrary to the goals of democratic education. Quoting from the final report of the Board's Commission on Integration, the Court notes its resolution that:

> "Whether school segregation is the effect of law and custom as in the South, or has roots in residential segregation, as in New York City, its defects are inherent and incurable. In education there can be no such thing as 'separate but equal.' Educationally, as well as morally and socially, the only remedy for the segregated school is its desegregation." [p. 337]

Skipwith observes that this report of June 1958 was authorized by the President of the Board of Education and developed under the auspices of an interested civic organization and a research group from New York University.[39]

The opinion next cites the testimony of two social scientists on the liabilities of segregated education and the role that teachers play in the learning process. Skipwith mentions the testimony of Dr. J. Wayne Wrightstone, a psychologist and research director at the Board. Besides noting his endorsement of the above quotation from the Integration Commission's report, Judge Polier, in summarizing his testimony on pupil achievement, observes that the witness emphasized the following determinants:

> Inherited characteristics; nutritional and other factors present before and after birth of a child. Environmental factors in the home and the community; aspiration, level of the individual and his parents; amount of schooling attained by parents; instruction or teaching. [p. 337]

Skipwith adds that Dr. Wrightstone acknowledged there was little deviation in IQ scores among all public school children until the fourth grade. According to the witness, a widening spread in IQ's between children in Negro and white schools develops when verbal content is stressed.

The other psychologist cited is Dr. Kenneth B. Clark, who is a member of the Board's commission and a participant on its Subcommission on Educational Standards and Curriculum. The opinion notes that he is referred to in the Brown decision as an authority on the detrimental effects of segregated

education. Skipwith states that Dr. Clark's testimony emphasized the role of schools in motivating children to learn. He is quoted as having said:

> "I certainly agree with Dr. Wrightstone that the factors and the problems involved in the achievement of a child, or educational achievement of a child, are complex and subtle. I think, among the complex and subtle factors, is the child's estimate of what other people think of him and how he is treated and what is expected of him....it is my personal judgment that subtle attitudinal factors may be as important, if not more important, than the more measurable, concrete deficiencies which are usually found associated with segregated schools." [p. 338]

Skipwith links the testimony of these witnesses to its major holding on teacher staffing by stating that the witnesses point out that "the quality of teaching is still another vital factor in determining the adequacy of education" (p. 338). The opinion also notes,"indeed, it is a truism that the more the child is disadvantaged by other factors, the greater the need of the child for skillful teaching" (p. 338).[40] (Although the relevance of social research in legal determinations is controversial, the reasons surrounding their use in Skipwith lessens criticism.[41] The reasons for this are twofold. First, the statements on the inherent disadvantages of segregated education are supported in law both by the Supreme Court's 1954 desegregation decision and by policy statements of the New York City Board itself. Second, this section is of marginal importance in the opinion since the central holding on inequalities in school staffing turns on a more purely legal basis,as

we shall discuss later.) This section of Skipwith is not part of the holding of the case when it concludes that:

> Certainly it is fatuous [for the Board of Education] to make declarations regarding the educational handicaps imposed upon a child by being in a segregated school and not to take reasonable measures to assure that such child is given teachers at least equal in qualifications to those not so disadvantaged. Yet such is the case in the public school system of New York. [pp. 338-339]

The final contention of the respondents is taken up at this point.

After determining the facts, Skipwith finds that the children are provided with inferior teaching personnel; consequently, there is no basis for an adjudication of child neglect against them. The Court states:

> These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education....the course upon which they embarked, and which brought them before this court, was undertaken for the sake of their children and for the tens of thousands of other children like them who have been unfairly deprived of equal education. The petitions are dismissed. [pp. 345-346]

Skipwith renders corollary holdings that teaching staffs are to be equal in professional training throughout the school system; the Board is entirely responsible for the discriminatory educational situation in the Harlem community; and although the Court is not called upon to formulate remedies, the Board is to bring the system in accord with the 14th amendment's guarantee of equal protection of the laws with "determination, resource-

fulness and leadership" (p. 345). Skipwith also adds that high financial costs are not acceptable excuses for further delay.

Testimony from school administrators and statistical data requested from the Board of Education by the Court form the factual bases for these holdings. United States Supreme Court and State Appellate level adjudications as well as public policy statements by the Board are used in the legal interpretations.

On the issue of whether teaching staffs in the Harlem schools are inadequate, Skipwith mentions the testimony of a principal from one assigned school, and from the Board's Junior High School Division an assistant superintendent in charge of personnel, and one in charge of curriculum. Since the litigants agreed to consider one school as representative, testimony on staff conditions is provided for only one of the assigned junior high schools. The principal said that only 42 teachers out of his 85-member staff are regularly licensed by the Board to teach their assigned subjects. The other 43 teachers are substitutes. (Skipwith notes that the educational requirements for regularly licensed teachers are higher than for substitutes. As an example, it is mentioned that 30 hours of graduate courses are required of licensed teachers whereas none are needed by substitutes.[42] In the principal's breakdown of his staff, he said that in the science department, three out of six positions are filled by

teachers who are licensed to teach the subject whereas one is a substitute social science teacher. Another is licensed to teach only in elementary schools. (Skipwith does not indicate the qualifications of the sixth teacher.) The witness also said that out of 11 teaching positions in the mathematics department, only two are filled by qualified personnel; four are licensed to teach either foreign languages or social studies; and one to teach business courses. (The Court does not mention the training of the four other teachers.) In addition, the assistant superintendent in charge of personnel is quoted as having said that "there is a shortage of teachers and, particularly, a shortage of teachers in the junior high schools, so no matter what we do is spreading poverty" (p. 340).

In order to determine how this shortage is spread among the schools, the plaintiff was requested to submit information on the ethnic composition of student bodies as well as percentages of regularly licensed teachers in its junior high schools. (Though judicial intervention during the presentation of evidence may appear contrary to our popular notion of an adversary system with competent counsel it is recognized as a proper role of a court when either clarification of the issues is needed, or access to evidence is not freely accessible to one of the litigants.[43] In this instance, it appears that the evidence requested was not readily available to the parents.)

Skipwith mentions that data was submitted on all but seven of 127 junior high schools. The data revealed that 68 schools

have Negro and Puerto Rican student bodies of either over 85 per cent or under 15 per cent. The Court is concerned with staff qualifications in these schools. The following table includes the submitted statistical data by city borough:

REGULARLY LICENSED TEACHER VACANCIES IN JUNIOR HIGH SCHOOLS AS OF SEPTEMBER 1958

Negro & Puerto Rican Student Population over 85 Per Cent			Negro & Puerto Rican Student Population under 15 Per Cent	
Borough	No. of Schools	Per Cent Vacancies	No. of Schools	Per Cent Vacancies
Manhattan	7	(48.8)	2	(28.0)
Brooklyn	3	(55.0)	22	(31.6)
Queens	2	(33.0)	18	(27.8)
Bronx	4	(55.0)	10	(29.0)
Total	16	Total 52		
	Average(49.5)		Average	(29.6)

(In re Skipwith, at page 341.)

Judge Polier concludes that as of September 1958 a city-wide pattern of discrimination exists against predominately Negro and Puerto Rican junior high school children, since the average percentage of vacancies of qualified teachers in their schools is 49.5 per cent, whereas for predominately white schools it is 29.6 per cent.

Skipwith also provides a further breakdown for specific schools in Manhattan. The following table contains this information:

REGULARLY LICENSED TEACHER VACANCIES FOR
MANHATTAN JUNIOR HIGH SCHOOLS

J.H.S. No.	Per Cent Negro and Puerto Rican	Per Cent Vacancies	J.H.S. No.	Per Cent Negro and Puerto Rican	Per Cent Vacancies
*136	100.0	(51)	167	14.1	(20)
*139	100.0	(50)	52	11.2	(36)
88	99.9	(58)			
120	99.9	(50)			
83	95.1	(45)			
171	93.3	(49)			
43	86.9	(39)			
Average Per Cent Vacancies		(48.8)	Average Per Cent Vacancies		(28)

(Adapted from In re Skipwith, at page 346.)

*Children of the respondents, including Charlene Skipwith and Sheldon Rector, were assigned to these schools.

The Court notes that at the two assigned schools, licensed teacher vacancies are respectively 50 per cent and 51 per cent.

By using Junior High School No. 136 as an example, Skipwith next considers whether anything has been done by the Board to provide Harlem schools with more qualified teachers and to improve the teaching and program. On the issue of regularly licensed teachers, the opinion mentions that the assistant superintendent in charge of personnel testified that she does not have authority to reassign more qualified teachers

to these schools. Skipwith mentions testimony of the principal at JHS 136 which shows that despite a sincere interest in improving the quality of his staff, the situation at his school has remained practically unaltered since September. Judge Polier concludes that "no evidence was submitted to show that the Board has adopted any procedure under which correction of the discriminatory imbalance between regularly licensed and substitute teachers could be reasonably anticipated" (p. 341).

On the issue of improving teaching and program, Skipwith notes that the assistant superintendents testified that they hope to raise reading levels and lower class sizes at JHS 136. It is mentioned that nine new teaching positions have been created including five filled by licensed teachers, and that two remedial reading teachers have been added as well. The Court observes that for the first time, a class for children with high IQ's was begun in the fall of 1958. At the same time, however, the Court notes that the school (and JHS 139 as well) suffers from high percentages of retarded children and substitute and inexperienced teachers. Skipwith states that an experienced and qualified staff is particularly necessary for coping with the special social and economic characteristics of ghetto children.[44] The Court finds, however, that with 269 children in one grade alone who are more than two and a half years below the median reading level, "neither these limited ameliorative steps, nor the unquestionable devotion

of the Principal to improving the educational program of Junior High School 136 touches the core of the problem" (p. 342).

Having concluded that the plaintiff has not taken adequate steps in the Harlem schools either to correct the imbalance in teacher staffing or to improve teaching and program, Skipwith considers, at this point, the legality of these inactions. Relying both on the principle in the 14th amendment that no state shall deny to any person equal protection of the laws, as well as on a Board resolution, Judge Polier finds the existing situation in the schools to be illegal.[45]

Skipwith cites as judicial authorities United States Supreme Court cases which have applied the equal protection doctrine to the field of education. The Plessy v. Ferguson case is emphasized.[46] This 1896 decision held that the 14th amendment requires facilities for ethnic groups to be equal though separate. (While Plessy concerned segregation in railroad passenger cars, it has been generally interpreted as upholding other Southern "Black Codes" as well, one of which required separate educational facilities for Negro and white children.[47]) Another case mentioned is Sweatt v. Painter, in which the Supreme Court emphasized that equality in education for Negro and white schools means equal standing of faculties, experience of administrators, and influence of alumni.[48] Skipwith states that this decision of 1950 should have left the New York school authorities with no doubt that separate facilities should be anything but equal. Judge Polier also cites

the Brown decision. (Though it is indicated that this case is not required to alert the plaintiff to its constitutional obligations, Skipwith holds that though de facto segregated schools are inherently discriminatory, the Board, nonetheless, is responsible for unequal teacher vacancies within this system.) In further comment the opinion includes a quotation from a report accepted by the plaintiff over a year before the current litigation began. This study by the Commission on Integration found it

> "...morally indefensible to allow the continuance of the present unequal staffing of our schools... /our/ recommendations are concerned with recognizing, first the right of all children to a fair share of experienced teaching; second, the need for a changed assignment policy that recognizes this right...third, the right of children, teachers, and supervisors to equal conditions for teaching to the extent to which the school system can provide it." /p. 343/

Skipwith notes that this report recommended that teacher assignments be determined by school needs, and not by teachers' choice, which is current practice.

Citing these judicial precedents and an approved policy statement, Judge Polier concludes that the constitution requires equality, not palliatives, on the issue of regularly licensed teachers, and that the plaintiff "has done substantially nothing to rectify a situation it should never have allowed to develop, for which it is legally responsible, and with which it has had ample time to come to grips, even in the last four years" (p. 343).

In addition to this major holding, Skipwith provides three related conclusions as well. Judge Polier holds that the plaintiff, by allowing teachers to choose where they teach, is legally responsible for the discriminatory pattern which occurs.[49] It is emphasized that teachers are paid public employees and that their school assignments are governmental actions, whether made by a board of education, or left to the teachers. On finding that the Board cannot be excused from its responsibility, Skipwith makes the parallel of the plaintiff's inaction and a police captain who allows his patrolmen to choose not to accept dangerous or unpleasant assignments. The police chief and the Board, notes the Court, are equally accountable for their inactions. Skipwith relies upon three adjudications in further support of this position. (The Court's interest in establishing that teachers are performing governmental functions when they choose their working sites, also, is crucial to the reasoning in the opinion. By this linkage, the teachers' behavior is subject to the equal protection clause of the 14th amendment that prohibits discrimination in state actions.)

Skipwith first cites Rice v. Elmore.[50] This decision in 1948 by the United States Court of Appeals for the Fourth Circuit found South Carolina responsible for a primary election even though the state had given control over its operations to private individuals. The federal court held that no electoral process is legal which results in discrimination against an

ethnic group. The case was decided by the 15th amendment, which forbids any state to deny to any citizen the right to vote because of ethnicity.[51] Skipwith next mentions both the majority and dissenting opinions in Dorsey v. Stuyvesant Town Corporation; which was adjudicated in 1949 by the New York State Court of Appeals.[52] The majority opinion held that a private corporation was not engaged in a state action, though it was building a housing development under a municipal contract for slum clearance. Therefore, the builder's refusal to consider potential tenants regardless of ethnicity was not held to be in violation of the 14th amendment. The dissenting opinion in Dorsey, however, argues that the builders are representatives of the state, since their activity is of public importance, and through the state they have been accorded power, interest, and support. (It seems that Skipwith has referred to this minority opinion because of its broad interpretation of state action.[53]) The last case cited is Nixon v. Condon.[54] In this 1932 decision, Supreme Court Justice Benjamin Cardozo ruled that Negro citizens may not be deprived of their right to vote by the discriminatory policies of a political party, even though a Texas law authorized the organization to determine who shall vote in primaries. In concluding this section, Skipwith quotes Justice Cardozo in stating that public school teachers, like the leaders of the political party in Nixon, are "not acting in matters of merely private concern like the

directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its function" (p. 344). With these cases, Skipwith establishes that the Board's passivity does not absolve it from legal responsibility.[55] (This is further evident when one realizes that, unlike political party workers or building contractors, teachers are directly employed by the state and have privileges of tenure and pension.)

The next holding in Skipwith states that the Court will not determine how the plaintiff should rectify the staffing imbalances. It is suggested, however, that the situation might be remedied by compulsory assignment of veteran teachers to understaffed schools, by offering incentive pay to teachers who teach in these schools, or by strengthening services and facilities in the schools to attract more qualified teachers. (Judge Polier's hesitancy in providing for a specific implementation of the major holding is in keeping with the judicial precedent in the enforcing section of Brown.[56] In this case, the Supreme Court left the formulation of desegregation plans to local school authorities with federal district court to act as supervisors.[57])

Though Skipwith does not provide a calculus for change, it is suggestive of what may be done. The last holding emphasizes that the educational needs of Harlem schools must be met

by the plaintiff regardless of costs involved or existing teacher shortages. The Court asserts that the problems of the New York City school system are less difficult than those in cities which have had to change from completely segregated to desegregated school systems. (Skipwith, therefore, implies that it is very impatient with the Board for not having solved them sooner.)

Skipwith cites four cases in emphasizing that financial or staff hardships are not acceptable excuses for delay. The first three citations concern governmental responsibilities and budgetary pressures. Skipwith mentions the 1934 Jaffe decision.[58] In this case, the New York Court of Appeals found that a school board cannot deny appointing needed teachers because future financial problems are expected. The second case is O'Reilly v. Grumet.[59] This 1954 adjudication on the state appellate level held that insufficient funds could not be a basis for not appointing a needed fire department captain. The third case was decided in 1957 by the U. S. Court of Appeals for the Fifth Circuit.[60] In Borders v. Rippy, a school board had to integrate its schools even though under a Texas statute it would lose six million dollars a year in state support. The last case cited in this section is Davis v. Board of Education. Skipwith refers to the part of this 1942 opinion which ordered a teacher to be hired on a regular basis if he is qualified and if the legislature has not forbidden the

board to increase its staff.[61] (By mentioning these cases it seems that the Skipwith court prefers economic incentives and other remedies as less disruptive than wholesale reassignment of teachers for improving de facto segregated education.)

Judge Polier concludes with a statement expressing compassion for the action which the respondents have taken by keeping their children out of school, noting that the parents have acted out of genuine concern for their children and for tens of thousands of other Harlem youths who are not receiving an adequate education. The opinion ends by dismissing the charges of neglect which had been brought against the parents by the Board of Education.

III.

THE SKIPWITH CASE AS LEGAL AUTHORITY

Norms of law develop in societies through complicated and at times uncertain processes. In the United States, however, this is more clearly regularized in legislative procedures and a hierarchical judicial system. Even so, emotionally charged issues so closely related to the institutions and diverse groups as those in Skipwith have had histories of contrary adjudications and vacillating public attitudes. Thus, it may be well to keep in mind that this case is important in the context of a society where concepts of civil restraint and incremental change, if not inaction, conflict with constitutional imperatives and frustrated aspirations for human decency. With this unique dimension, therefore, the gauging of Skipwith as a legal standard presents difficulty.[62]

At the outset, we note that in a sense the only direct action in Skipwith is negative, in that the Court dismissed petitions brought before it by the plaintiff for child neglect. This aspect of the case may be important. In addition, while Skipwith represents a dramatic application of the 14th amendment to cover New York City parents who keep their children out of school in order to protest unconstitutional educational facilities, the decision certainly does not guarantee that the

same tactic of civil disobedience would be legal elsewhere.[63]

One handicap of Skipwith is that the adjudicating tribunal is a metropolitan court without recognized competence in answering constitutional questions.[64] This limitation is partially offset by the fact that Judge Polier is a seasoned member of the New York bench with over 25 years' experience; she is widely respected for scholarly expertise based on published studies and monographs on children and the judicial system.[65] With the scarcity of other suitable legal precedents, the Court's rendering of previous legal interpretations to a Northern compulsory school attendance law is valuable despite these limitations. Skipwith, by its scholarly opinion and sound structure, suggests how a future court might treat similar acts of self-help.

The Court's opinion is thorough and well founded in American legal precedents and rules of jurisprudence, and evaluation of this aspect should therefore merit our attention. In this part, we shall mention only the more important holdings, since the judicial basis for several of the lesser ones either have already been discussed or are not particularly relevant to an overall evaluation of the case.

In the first holding, the Court affirms its right of judicial review over conflicts between school boards and citizens, and notes that the argument of the plaintiff does not stand up.

In supporting this view, Skipwith relies primarily upon New York State adjudications, some of which were decided on the highest level. In addition, Skipwith mentions federal cases, including a U.S. Supreme Court decision, which upheld direct judicial review over administrative acts which may violate constitutional inhibitions. Skipwith might very well have relied upon other adjudications and drawn an opposite conclusion if it were so disposed.[66] The fact remains, however, that Skipwith's position on judicial review was properly supported by past cases on both state and federal levels. The Court's attitude has also been upheld in scholarly writing and succeeding cases as well.[67]

The holding in Skipwith that de facto segregated schools which result from adventitious residential patterns are not illegal is also supported by legal precedent. The explicit reliance of the Court on Henry v. Godsell[68] and Holland v. Board of Public Instruction[69] was clearly sound, since at that time they were the highest judicial authorities on the issue.[70]

On the major holding that a violation of equal protection exists in school staffing, Skipwith supports its position with data on the relative qualifications of New York City teachers supplied by the Board itself. It then applies primarily U.S. Supreme Court adjudications on equal protection in educational facilities in concluding that the city's Negro and Puerto Rican students, in general, and the respondents' children in particular, are denied the same educational opportunities as are

afforded in segregated white schools. Though Skipwith's assumption that the higher the level of certification, the better the teachers, is open to challenge,[71] existing administrative standards and goals of the school authorities seem to incorporate this view. It is made clear when Skipwith mentions a public statement by the Board of Education which explicitly defined its goal of providing more professionally qualified teachers in low-income schools.[72]

An important question on the staffing situation, not explored or even suggested by the litigants or the Court, is the extent to which teacher-pupil ratios are the same throughout the school system. After the decision, the Superintendent of Schools contended that discrimination does not exist, since the higher percentage of substitute teachers in low-income communities results from the greater need for teachers to provide special services. He claimed that these schools have the lowest teacher-pupil ratios, and implied that this would change if the schools had fewer substitutes.[73] A corollary of his view is that if the ratio of pupils to teachers were uniform in the system, the percentage of certified teachers would be consistent as well. Though this is suggested by the Board of Education, it certainly did not attempt to prove this position during the litigation.

Another holding in Skipwith is that the Harlem parents have the legal right to elect no education for their children rather than send them to schools which have been found to be

inferior. Possible criticism of this position is that compulsory school attendance laws are weakened even when there is only doubt as to the inequality of educational facilities, that mass truancy would result, and that the Court's standard of equality is not reasonable for a school board which has an acute teacher shortage.[74] The Court expressly rejects these notions. Though to exempt children from attending school, as Skipwith has done, is a dramatic legal act, the inferior characteristics of the Harlem schools, the genuine educational concern of the parents, and, at least that time, the seeming inertness and paucity of imaginative responses by the school system to these problems and needs, are held by the Court to be more important considerations than assumptions that an education, no matter how substandard, is better than none at all, and that the Board of Education is acting properly by allowing teachers to select their school sites. Though the latter emphasis is plausible, the Board of Education in the Skipwith litigation clearly does not prove its legal relevance. In fact, another equally plausible speculation, though of a contrary view, is that an institutional education is not even being provided, since children attend schools which are so understaffed that some classes may be covered only by non-permanent substitutes, if at all.[75] These unstable teaching staffs could be discriminatory. Children's attitudes resulting from attendance at poorly staffed schools might be

harmful to their motivation and intellectual development. In such instances, receiving private tutoring or even staying at home would be clearly preferred. Unfortunately, the Court does not explore, or mention, whether disproportionate numbers of uncovered classes exist in Harlem schools, and it does not discuss the educational advantages of either the tutoring being given the respondents' children or their remaining at home. It is in assuming that no education is better than the one provided by the Board that the opinion seems most in need of clarification. The unusual circumstances of the litigation, however, are moderating factors.

The Board of Education initiated proceedings in the Children's Court and argued on a statutory basis without offering a defense of its policies for the Court to consider. Consequently, Judge Polier, noting her power of judicial review, might have imprisoned the parents for statutory child neglect, though their action resulted from a desire to have a decent education provided for their children, or resolved the litigation on constitutional grounds, although the argument of the school authorities did not consider the question of constitutional guarantees. Skipwith illustrates the latter course. And given the formal concern of a children's court for protecting and keeping children in family environments, the attitude of the Court on this question may be understandable.

Furthermore, since the cogency of the Board's policies as they affect the Harlem schools was not shown in Skipwith, it

is difficult to assume that New York City is doing its utmost in meeting constitutional imperatives. This is particularly so when it is realized that Skipwith even provides clues for changing the imbalance in teaching staffs and improving public education in face of the teacher shortages. By ending the opinion with suggested remedies, Judge Polier also seems less concerned with fostering legalized mass truancy, than with prodding the Board of Education to make substantial improvements in its institution. Even so, the Dobbins v. Commonwealth decision of 1954, and not Skipwith, introduced the principle that a compulsory school attendance statute may be set aside when ethnic discrimination is involved.[76] In this respect, the New York City opinion only extended the precedent to a Northern community where ethnic discrimination takes more subtle forms than in the South.

Another aspect of the opinion worth mentioning is that the Skipwith court is not concerned with organizational rigidities or client interests, such as those of strong teacher groups, which may restrict flexibility in policy-making at the Board.[77] Judge Polier, instead, establishes for the school authorities a standard of behavior in accord with the higher values and guarantees in American law. The Court's avoidance of discussing problems of innovation or evaluating the obstacles to change are understandable, since such considerations involve political questions traditionally outside the scope of a judicial body.

Contribution to the Development of Law

As a juridical occurrence, the case in its almost ten-year history should have also attracted attention of judicial authorities, including judges, commentators, and professors of law. Upon surveying adjudications and scholarly writings, we find that the secondary holdings in Skipwith have been accorded judicial notice, while the major holding, which concerned compulsory school attendance, has received somewhat less attention.

In two adjudications, Skipwith has been cited as judicial authority. In Application of Lombardo, the New York County Supreme Court in 1962 held that a professor who claimed that his promotion was denied because of religious bias does not have exclusive remedy to the State Commissioner of Education.[78] In this instance, Skipwith was mentioned along with other cases in holding that when basic rights are at issue the courts have jurisdiction. It could be added that Skipwith's interpretation of the State Commissioner's role is of further interest since it established the right of direct judicial review over those education policies that concern ethnic discrimination in public school facilities. Other holdings in Skipwith have received attention in a later adjudication. The recent desegregation decision for Washington, D. C. (note 4, supra) cites Skipwith in two places. First, it is noted that Skipwith established that an equal protection violation exists in schools even if the only disparity is in the relative numbers of qualified teachers.[79] Second, Skipwith is credited with establishing

that ethnically induced preferences of teachers are liable to constitutional standards.[80]

Skipwith seems to have contributed to three major legal aspects of school desegregation as well. First, the case has brought the Sweatt decision to the North by proving that Northern school systems discriminate against Negro children in terms of resources and staffing, as they do in the South.[81] Scholarly writings have credited Skipwith with establishing that when de facto segregation exists, the pre-Brown cases on ethnic discrimination in education are applicable.[82] A second contribution of the case is its rendering of the 14th amendment to passive acts of government which nonetheless result in an unequal application of the laws. The Skipwith case is viewed as extending the amendment to yet another subdivision of state policy including teachers who, because of governmental inaction, are able to refuse their services to Negro children.[83] A third and related aspect of Skipwith is that by looking at teachers' professional qualifications, it provides a criterion for comparing the quality of educational opportunities in de facto segregated Negro and white schools.[84]

Extralegal Implications of the Decision

While we emphasize the legal contributions of the case, it is easy to remove Skipwith from its surrounding society and not fully understand its significance. No doubt, the parents were sufficiently well satisfied by the decision to allow the legal

action to end; and the Board, while not convinced by the Court that its educational facilities for ghetto communities were illegal, did not prosecute appeal proceedings--possibly since the Court avoided establishing guidelines for improvement of these facilities, and the children, reassigned to an integrated school by the Board, were returned to public schooling.[85]

Certainly, the case is not likely to be considered of overriding importance by educational policy-makers. One may even question if the New York City school system views Skipwith as important to its own staffing procedures.[86] Even so, Skipwith is a factor, along with other adjudications, that creates a background of judicial opinion conducive to proponents of desegregation. In this sense, the case, through encouragement for some and fear of judicial sanctions for others, affects society in more subtle ways than directly altering public policies and statutes.[87] Of course, the nature of these implications is determined by how Skipwith has been perceived by parents, lawyers, and others with resources and inclinations to influence school board policies. We shall limit comment, also, to only those instances where clues are clearly visible.

The case has had an impact in New York City and elsewhere. The plaintiff, eventually, seemed to incerpret Skipwith as a warning that it must take steps to placate the respondents and other parents like them in the future.[88] In addition to the arrangements made with the Skipwith parents, within three months of the decision and shortly after deciding not to appeal, the

Board initiated a feasibility study on allowing Harlem youth to attend underutilized schools outside the community.[89] A year and a half later, in the fall of 1960, it began a modest student transfer program called "open enrollment."[90] Over a three-year period, this plan has allowed over fourteen thousand transfers from heavily segregated Negro elementary and junior high schools throughout the city (including JHS 136 and JHS 139) to white receiving schools.[91] Now known as the "free choice transfer program," it is still in operation today.

While this action shows that the Board, after the Skipwith decision, certainly moved to give more children equal learning opportunities, it also provides clues for our speculating on the context in which the Board of Education went about improving its educational facilities. Upon realizing that it might be faced with more sustained school boycotts, like those prompted by Skipwith, the Board of Education seems to have adopted a strategy of allowing a very limited number of minority-group students to attend white schools.[92] By keeping the program small, and thereby not invoking large-scale white opposition, it would still further desegregation, and at the same time ease pressure for more change from local civic groups allied with the Negro communities. By these tactics, the Board therefore avoided the major problems in the schools, as pointed out in Skipwith. The direct confrontation of these problems would have required sizable allocations of financial resources and teaching staffs, and could have caused collisions between the Board of Education and more intrenched interest groups in its constituency.

These interpretations are based upon events leading to the open enrollment program. Our impressions of the period between the Skipwith decision in December 1958, and the beginning of the transfer plan in September 1960, are derived primarily from newspaper accounts, and our more recent informant interviews. Furthermore, though it is difficult to delineate a causal relationship between Skipwith and open enrollment, our findings are strongly suggestive that the litigation was a very important influence on the adoption of the open enrollment plan.

After the December decision, the Skipwith litigants reached compromises on where the children would attend school, and that the decision would not be appealed. These occurred, however, only after two months of conflict between the Board of Education and the parents. In early January of 1959, the parents unsuccessfully tried to register their children at schools outside the community. Their attorney, Paul B. Zuber, also threatened to institute legal proceedings against the Board for incompetency if it did not respond to the Skipwith holdings.[93] The Board's official reaction came at its mid-January meeting, when it voted to appeal the decision.[94] This seems to have persuaded others sympathetic to the parents to enter the controversy. For besides the dissenting vote and comments at the Board meeting by its one Negro member, within a few weeks state legislators as well began to call for an investigation of school policies based on Skipwith.[95] And shortly thereafter, it was reported that the Urban League of Greater New York had joined the parents in negotiating with the school authorities.[96]

Though it is difficult to gauge the influence of these spokesmen, it does seem that their publicized entry coincided with the Board's increased receptivity to the parents' demands. By the middle of February, it was announced at a joint news conference by the school superintendent and the parents' attorney that the Skipwith students would go to a nearby junior high school which had special facilities for counselling and college preparation.[97] It was also mentioned that these special programs would be started in the two schools in which the children had been assigned prior to Skipwith. It is interesting to note, however, that a few weeks later it was reported in the press that reassignments of regularly licensed and experienced teachers would not be made.[98] From the parents' point of view, the timing of this policy statement, as well as the absence of a tangible program for equalizing teaching staffs throughout the school system, may have only increased suspicion that further improvement of de facto segregated schools was not a high priority at the Board.

Although the immediate problem of getting the students back to school had been resolved, the issue of appealing Skipwith was still in dispute. At the February news conference, while the respondents' attorney announced that they were asking for one million dollars in a civil suit against the city for damages suffered by their children, the superintendent stressed that Skipwith would be appealed. However, by the end of that month, after the children had returned to school (including those whose parents had been

found guilty of truancy by another judge a few days before Skipwith[99]), and after being picketed by ministerial spokesmen, and leaders of over seventy civic groups in the metropolitan area (including the Urban League, the American Jewish Congress, and the National Association for the Advancement of Colored People), the Board formally decided to reconsider its earlier appeal decision.[100] Since then, no action has been taken on the case by either of the litigants.[101]

The following September, Harlem parents again kept their children out of the same two junior high schools. Represented by the attorney in Skipwith and endorsed by the same constituency, including the New York City chapter of the NAACP, requests for school transfer and a school boycott were continued by twenty-five families under the leadership of a Skipwith co-respondent.[102] The action also seems to have been prompted in part when children from a white community were transferred to an underutilized junior high school in another borough, and when a class of high-IQ pupils from a school near Harlem were transferred to one in a white community.[103] The parents, no doubt, reasoned that if these children were sent outside their school districts, the same could be done for Harlem students who have the disability of being assigned to schools which have been adjudicated as providing inferior educational opportunities. After a futile meeting between the superintendent of schools and the boycott leaders, attorney Paul Zuber initiated

litigation in the county supreme court calling upon the Board of Education to show cause why students assigned to JHS 136 and JHS 139 should not also be transferred to the underutilized schools.[104] By this, Zuber could hope at minimum to draw public attention again to the needs of Harlem schools and, at maximum, to get an agreement on integrating the school system. On September 18th,when the boycott began, the Board did not press for truancy charges against the parents. Instead, it made plans to argue in the State Supreme Court of New York County that the parents had no legal claim for requesting that their children cross school district lines. By the end of September, with the court trial pending, a teaching staff, composed of Zuber, his wife, a community religious leader, and a college professor, began tutoring 25 students in facilities provided through the local U. S. congressman.[105] In late November, charges of discrimination against the Board were dismissed. The county court held that the parents had urged a redrawing of school district lines, which it found to be the proper responsibility of the Board of Education.[106] By the end of the year the parents were under court order by a children's court judge to have their children return to the assigned schools.[107] Instead of complying, most of the parents continued to keep their children out of school.[108] Again in January and February the children were ordered back to the assigned junior high schools.[109] The issue was not settled, however, until early March, when to the satisfaction of the court and the parents, the superintendent of

schools reluctantly reassigned the remaining 23 students to integrated schools.[110]

Running parallel to the action of the Harlem parents, whites in another borough were boycotting a school where the Board was making its first attempt at integration.[111] The public attitudes toward any school opposition may have been particularly hostile as a result of this latter conflict.[112] In any event, the Harlem community was making plans to boycott schools again the following fall when, in August of 1960, the Board of Education announced that, by parental request, it would transfer about three thousand junior high school students from overcrowded Negro and Puerto Rican schools throughout the city to under-utilized white ones.[113] With this development, plans for the boycott ended.

Possibly an even more significant repercussion of Skipwith is its influence on desegregation litigation elsewhere. Within two years of the decision, Paul B. Zuber advised a group of parents in New Rochelle, New York, to keep their children out of school as had the parents in the nearby New York City litigation.[114] Through Zuber's strategy, the truancy charge was dropped, and the action was adjudicated eventually by a federal district court. The case resulted in New Rochelle's being the first Northern community found to have violated the prohibitions in the 1954 integration decision. In addition, the United States Commission on Civil Rights observed that the New Rochelle opinion, referred to as the "Little Rock of the North," encouraged parents

in other communities to protest their segregated school facilities as well. And within a year of the decision, it was reported that litigations in 20 cities located in 11 Northern states had been initiated.[115] Though the original legal action in New Rochelle might have occurred without Skipwith, the New York City decision may well have encouraged persons in the community to seek more equable education policies.

Conclusion

Though one may doubt whether a legal institution, particularly on the metropolitan level, can alter major societal inequalities, the Skipwith decision clearly reveals a dramatic attempt to do so. For a document which provides a legal perspective on educational problems in New York City, the case may be viewed as extending the equal protection clause of the 14th amendment both to uphold a form of self-help by Harlem resients and to question permissive teacher assignment procedures by the Board of Education. For a litigation which concerns diverse groups in a desegregation struggle, our focus on the extralegal repercussions of Skipwith suggests the subtle influences that similar adjudications may have upon other American communities and educational institutions as well.

Notes

1. 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958); the relevant page numbers in the official report are 325-347 [cited hereinafter by page reference only].

2. Brown v. Board of Education, 347 U.S. 483 (1954) [hereinafter cited as the Brown or integration decision of 1954].

3. For interesting discussions of this issue see Buss, The Law and the Education of the Urban Negro, in Educating an Urban Population 77 (M. Gittell ed.1967); 1 United States Comm'n on Civil Rights, Racial Isolation in the Public Schools 229-236 (1967); and see also note 38, supra.

4. Recently Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia extended the desegregation doctrine to include de facto segregation. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

5. For more information on this see Larner, I.S. 201: Disaster in the Schools, 14 Dissent 27 (1967); Gustaitis, The Angry Parents of I.S. 201, The Reporter, Nov. 17, 1966, at 30.

6. For elaborated histories of this controversy see M. Gittell, Participants and Participation: A Study of School Policy in New York City (1967), especially ch. 6; D. Rogers, Obstacles to Desegregation in New York City Public Schools (Unpublished report at Center for Urban Education 1967).

7. For detailed descriptions of some of these activities see (1964) I. Goldaber, The Treatment by the New York Board of Education of Problems Affecting the Negro 1954-1963 (Dissertation in New York University Education Library).

8. Our information on these groups are from informant interviews with Bernice Skipwith, Stanley Skipwith, and Shirley Rector, and with school personnel involved in the litigation.

9. Bernice Skipwith, in an interview with the authors, recalled that prior to the boycott, she and other parents had collected detailed information on the assigned junior high schools through discussions with principals and other school personnel.

10. Through information supplied to the authors by a high-ranking school authority directly involved with the transfer arrangements, the existence of the program has been confirmed. This spokesman recalled that the program was very small, possibly not involving more than ten youngsters. The informant mentioned that, in selecting the children, care was taken to choose those who were gifted, and who could easily fit into an integratad environment. He noted that records on the selection of the children were not kept.

Another informant, who at the time was an administrator at an elementary school involved in the early transfer program, mentioned that more than likely children from the middle-income project went to the integrated junior high

school. While emphasizing that this did not result from conscious intent on the part of school authorities, he speculated on those circumstances that made this probable. First, he recalled that the children in the area who went to the integrated junior high school were students who had been in the integrated elementary school program. Second, the informant mentioned that parents in the middle-income project were active in the organized affairs of his elementary school --particularly in complaining of the overcrowded conditions; and that the transfer program to the integrated elementary school had been established in response to their concern. Third, he noted that bussing was not provided to the school--making it difficult for parents without cars to participate. The informant recalls seeing car pools, at least during the elementary/school phase, leaving from the middle-income project.

Although school authorities maintain that regardless of their own actions, the Skipwith parents were intent on testing in the courts the principle of de facto segregated schooling, we conclude that the seemingly inadequate communication of school officials in explaining the junior high school transfer program to non-participating parents, certainly increased community suspicion during this period. We note, also, that our interest in this transfer program is not to pass judgment on the behavior of the school officials, but rather to show those perceptions of the school system held by the

Skipwith parents which they claim prompted their decision to boycott the schools.

11. Under the New York Constitution, a free education is to be provided for all children. The section states:

> The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated.

N.Y. Const. art. 11, sec. 1.

12. This amendment, which was enacted in 1866 by a Reconstruction Congress, was directed toward showing the states that emancipated Negroes were guaranteed the same legal rights and liberties as enjoyed by other citizens as stated in the Bill of Rights to the Constitution. Section 1 of the amendment states:

> ... No state shall make or enforce any law which shall abridge the privilegesor immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the <u>equal protection of the laws</u>. [emphasis ours].

U.S. Const. amend. XIV, sec. 1.

13. Section 310 of the Education Law states:

> Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or

court whatever. Such appeal or petition may be made in consequence of any action....

N.Y. Educ. Law sec. 310 (McKinney 1953).

14. Section 3205 of the Education Law states:

> ...each minor from seven to sixteen years of age shall attend school upon full time day instruction.

Section 3212 notes that parents:

> ...shall cause such minor to attend upon instruction as hereinbefore required (paragraph b of subdivision 2) ....shall furnish proof that a minor who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending (paragraph d of subdivision 2).

N.Y. Educ. Law, secs. 3205, 3212 (McKinney 1953).

15. People v. Himmanen, 108 Misc. 275,277,178 N.Y.S. 282,283 (1919).

16. Matter of Conlin, 130 N.Y.S. 2d 811 (1954).

17. Matter of Myers, 203 Misc. 549, 119 N.Y.S. 2d 98 (1953).

18. Matter cf Richards, 166 Misc. 359, 2 N.Y.S. 2d 608, aff'd, 255 App. Div. 922, 7 N.Y.S. 2d 722 (1938).

19. DeLease v. Nolan, 185 App. Div. 82, 172 N.Y.S. 552 (1918).

20. Matter of Weberman, 198 Misc. 1055, 100 N.Y.S. 2d 60, aff'd sub nom. Auster v. Weberman, 278 App. Div. 656, 102 N.Y.S. 2d 418, aff'd, 302 N.Y. 855, 100 N.E. 2d 47 (1950).

21. Section 61 of the Domestic Relations Court Act of New York City gives the Children's Court exclusive jurisdiction in cases involving children under sixteen and who are ne glected. Section 2 of the same act defines a neglected child as one who is under sixteen and who is unlawfully kept out of school.

N.Y.C. Dom. Rel. Ct. Act secs. 61, 2.

22. People v. Donner, 199 Misc. 643, 99 N.Y.S. 2d 830, aff'd, 278 App. Div. 705, 103 N.Y.S. 2d 757, aff'd, 302 N.Y. 857, 100 N.E. 2d 48, appeal dismissed sub nom. Donner v. People on Complaint of Silverman, 342 U.S. 884.

23. Frankle v. Board of Education of City of New York, 173 Misc. 1050, 19 N.Y.S. 2d 588, modified and aff'd, 259 App. Div. 1006, 21 N.Y.S. 2d 511, aff'd, 285 N.Y. 541, 32 N.E. 2d 830 (1940).

24. These cases are: Davis v. Board of Education of City of New York, 263 App. Div. 369, 33 N.Y.S. 2d 311, modified and aff'd, 288 N.Y. 330, 43 N.E. 2d 67 (1942); Sokolove v.Board of Education of City of New York, 176 Misc. 1016, 29 N.Y.S. 2d 581 (Sup. Ct. 1941); Jacobson v. Board of Education of City of New York, 177 Misc. 809, 31 N.Y.S. 2d 725, modified and aff'd, 265 App. Div. 837, 37 N.Y.S. 2d 647, appeal denied, 265 App. Div. 935, 39 N.Y.S. 2d 416 (1941).

25. Cottrell v. Board of Education of City of New York, 181 Misc.

645, 42 N.Y.S. 2d 472, aff'd, 267 App. Div. 817, 47 N.Y.S. 2d 106, aff'd, 293 N.Y. 792, 59 N.E. 2d 32 (1943).

26. Moses v. Board of Education of City of Syracuse, 127 Misc. 477, 217 N.Y.S. 265, aff'd, 218 App. Div. 811, 218 N.Y.S. 827, rev'd on other grounds, 245 N.Y. 106, 156, N.E. 631 (1926).

27. Cannon v. Towner, 188 Misc. 955, 961, 70 N.Y.S. 2d 303, 309 (1947).

28. Ellis v. Dixon, 118 N.Y.S. 2d 815, aff'd on other grounds, 281 App. Div. 987, 120 N.Y.S. 2d 854 (1953).

29. Since Skipwith other state adjudications, while ruling against the petitioners on the merits, have also rejected the contention that administrative remedies must be exhausted before judicial appeal. E.g., Leeds v. Board of Education, Union Free School District No. 23, 19 Misc. 2d 860, 190 N.Y.S. 2d 127, aff'd, 9 A.D. 2d 905, 195 N.Y.S. 2d 604 (1959)(dismissed action to resubmit an austerity school budget to voters); Coughlan v. Cowan, 21 Misc. 2d 667, 190 N.Y.S. 2d 934 (Sup. Ct. 1959) (superintendent need not supply a member of a school board with names of other members allegedly responsible for a policy decision); Cassel v. Board of Education Common School District No. 13, Southhampton, 220 N.Y.S. 2d 262 (Sup. Ct. 1961) (upheld bid award made by a school board for a school bus); Council v. Donovan, 40 Misc. 2d 744, 244 N.Y.S.

2d 199 (Sup. Ct. 1963) (upheld dismissal of substitute teacher for failure to participate in school shelter drill programs).

30. Estep v. United States, 329 U.S. 114, 122, 127, 133 (1945).

31. More recent decisions by the United States Supreme Court and the Court of Appeals for the Fourth Circuit have also held that plaintiffs need not exhaust state administrative remedies if federal constitutional rights are at issue. McNeese v. Board of Education, 373 U.S. 668 (1963) (Negro students suing for equitable relief against de facto segregation in Illinois); Rivers v. Royster, 360 F. 2d 592 (4th Cir. 1966) (right of a prisoner to subscribe to a religious magazine). The contention that administrative remedies must be exhausted before litigation begins has been questioned in recent scholarly writings as well. See Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 Yale L.J. 574 (1963); Jaffe, The Exhaustion of Administrative Remedies, 12 Buff. L. Rev. 327 (1963); 3 Davis, Administrative Law, secs. 20.01-20.10 (1958), at 56-115:

> The statement the courts so often repeat in their opinions--that judicial relief must be denied until administrative remedies have been exhausted--is seriously at variance with the holdings. Although the Supreme Court in the prominent case of Myers v. Bethlehem Shipbuilding Corp. [303 U.S. 41, 50-51, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1938)] referred to "the long settled rule of judicial administration that no one is entitled to judicial relief for a

> supposed or threatened injury until the prescribed administrative remedy has been exhausted," the Supreme Court both before and since has often provided judicial relief in absence of exhaustion of administrative remedies. And the state courts probably require exhaustion of administrative remedies less frequently than the federal courts.

Id. at 56.

32. The parents' remedy of keeping their children out of school, instead of pursuing their claims through the state commissioner and the courts seems to be sound strategy from their point of view. The scope of judicial review usually tends to be limited to questions of law, while the evidence in the original administrative decision is not evaluated. See, e.g., Inland Nav. Co. v. United States, 76 F. Supp. 567, 570 (E.D. Wash. 1948) (Interstate Commerce Commission granting operating rights to a water transportation company). The courts also may have refused to review an administrative order because sec. 310 of the N.Y. Educ. Law excludes review (note 13, supra). Cf. Unger v. United States, 79 F. Supp. 281, 286 (E.D. Ill. 1948) (upheld review of action between a war veteran and the Veterans' Administration over a request for an insurance policy because judicial review not specifically excluded in statutes concerning the insurance program); Soderman v. U.S. Civil Service Commission, 13 Ad. L. (2d) 93 (C.A. 9th, 1962) (for injuries suffered in the course of employment). In conducting administrative proceedings the New York State Commissioner of Education is not required to have a trial or hearing which includes cross-examination. See, e.g., Cochran

v. Levy, 175 Misc. 666, 25 N.Y.S. 2d 960, aff'd, 263 App. Div. 931, 32 N.Y.S. 2d 539 (1941) (in appealing a determination of the New York City Board of Examiners); Liebman v. Van Denburg, 168 Misc. 155, 6 N.Y.S. 2d 428 (Sup. Ct. 1938) (in appealing a determination of the New York City Board of Examiners). The burden of proving aggrievement may have been on the petitioners as well. See Matter of Harris, 58 Misc. 297, 109 N.Y.S. 983 (Sup. Ct. 1908) (Mayor of Troy, New York, tried to challenge a decision of a local school board before the state commissioner). With administrative and court procedures being lengthy, the parents' litigation also could have lasted beyond their children's required attendance at the assigned schools. If this occurred, the parents could lose their standing to sue while their children had gone to schools which were assumedly unconstitutional. For docket delay at that time in the state courts see Nims, The Law's Delay: The Bar's Most Urgent Problem, 44 A.B.A.J. 27-30, 90-92 (1958). For possible loss of legal standing see Doremus v. Board of Education, 342 U.S. 429 (1952) (parent's legal action against daily religious exercise in New Jersey public schools held moot because child graduated before appeal to Supreme Court was taken).

33. Dobbins v. Commonwealth, 198 Va. 697, 96 S.E. 2d 154 (1957). This litigation began in 1951 when a high school in West Point, Virginia, was closed and its students told to travel 18 miles to another segregated school in the county. Instead, they

applied to the segregated white school in West Point and were denied admission because of their ethnicity. The parents of the students refused to send them to the county school, and they were prosecuted under Virginia's compulsory attendance law. The State Supreme Court of Appeals found that the law is unconstitutionally applied when it results or brings about the inequality of treatment to the two ethnicities. The Court, noting that the county school had physical facilities and curriculum far inferior to those offered at the white school, also held that evidence concerning the two facilities is relevant in determining whether the compulsory school attendance law is being applied as a coercive means to require a citizen to forego his constitutional rights.

34. Cooper v. Aaron, 358 U.S. 1, 7 (1958).

35. Shelley v. Kraemer, 334 U.S. 1 (1948); Barrows v. Jackson, 346 U.S. 249 (1953). The Shelley case held that while a contract between private parties to discriminate against Negroes is legal, judicial enforcement of such a contract by state and federal courts makes the government itself a partner in the racial discrimination and thereby violates the 14th amendment. The Barrows decision five years later held that a restrictive covenant may not be enforced by a suit for damages against a white co-covenanter who broke the covenant. The court took no action against the Negro occupants since such a suit would have made the state party to the discrimination and denied equal protection of the laws.

36. Henry v. Godsell, 165 F. Supp. 87, 90-91 (E.D. Mich. 1958).

37. Holland v. Board of Public Instruction, 258 F. 2d 730-732 (5th Cir. 1958).

38. This attitude that a school board does not have to rectify segregated schooling which results from population shifts and concentrations has been upheld by the United States Supreme Court when it refused to review Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F. 2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964); Downs v. Board of Education of Kansas City, 336 F. 2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 36 U.S. L.W. 3138 (U.S. Oct. 10, 1967).

However, in some instances the district courts have held that school boards have a legal obligation, if not to integrate schools, then at least to prevent the perpetuation of completely segregated school systems. See Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass.), vacated, 348 F. 2d 261 (1st Cir. 1965); Blocker v. Board of Education of Manhasset, New York, 226 F. Supp. 208 (E.D. N.Y. 1964); Branche v. Board of Education of Hempstead, New York, 204 F. Supp. 150 (E.D. N.Y. 1962). The Supreme Court has also refused to review a similar case. See Taylor v. Board of Education of City School Dist. of City of New Rochelle, 294 F. 2d 36, 47 (2d Cir.), cert. denied, 368 U.S. 940 (1961).

39. Skipwith notes that Arthur Levitt, then president of the school board, had asked the Public Education Association to evaluate public education facilities in New York City for Negro and Puerto Rican children. This group enlisted the help of the New York University Research Center for Human Relations.

40. For an example of research which concludes that significant genetic intellectual differences cause lower academic performance of Negro school children, see A. Shuey, The Testing of Negro Intelligence (2d ed. 1966). For studies which emphasize environmental factors in IQ scores, see O. Klineberg, Negro Intelligence and Selective Migration (1935); Lee, Negro Intelligence and Selective Migration: A Philadelphia Test of the Klineberg Hypothesis, 16 Am. Soc. Rev. 227-232 (1951).

41. The 1954 integration decision with its use of social science findings evoked exchanges between scholars who wondered if social science is sufficiently advanced to be a basis for adjudications, and others who were concerned that the quality of research would be harmed by its having direct responsibility in public policies. See A.P. Blaustein & C.C. Ferguson, Desegregation and the Law: The Meaning and Effect of the School Segregation Cases, especially ch. 9 (2d ed. 1962); Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150 (1955); 31 id. 182 (1956); Berger, Desegregation, Law, and Social Science, 23 Commentary 471 (1957); Clark, The Desegregation Cases: Criticism of the Social Scientist's Role, 5 Vill. L. Rev. 224 (1959-60); Greenberg, Social Scientists Take the Stand: A Review and

Appraisal of Their Testing in Litigation, 54 Mich. L. Rev. 953 (1956); Garfinkel, Social Science Evidence and the School Segregation Cases, 21 J. of Pol. 37 (1959); Maslow, How Social Scientists Can Shape Legal Processes, 5 Vill. L. Rev. 241 (1959-60); Van den Haag, Social Science Testimony in the Desegregation Cases--A Reply to Professor Kenneth Clark, 6 id. 69 (1960); Pittman, The 'Blessings of Liberty' V. the 'Blight of Equality,' 42 N.C.L. Rev. 86 (1963).

42. The requirements for appointment to junior high schools are stipulated in the By-Laws of the New York City Board of Education, sections 332 and 332a (adopted December 23, 1952).

43. Compare Johnson v. United States, 333 U.S. 46, 50-56 (1947) (Frankfurter J., dissenting in part) (dissenting opinion emphasized that trial judge "need not blindfold himself" to available evidence because neither litigant choose to provide it), with United States v. Marzano, 149 F. 2d 923(2d Cir. 1945) (in a narcotics prosecution, the appeals court held that a judge may call and examine witnesses on his own), Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co., 143 F. 2d 826 (5th Cir. 1944) (U.S. Court of Appeals refused to review a case because the trial judge failed to make findings of fact; it was also suggested that if the parties failed to call material witnesses, the judge might do so), and Anderson v. State, 35 Ala. App. 111, 44 So. 2d 266 (1950) (trial judge may call witnesses in a murder prosecution). Judicial authorities have upheld the

power of a judge to call for evidence in order to clarify the issues. See also Model Code of Evidence, rule 105 (1942), at 102, 07; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952); Reid, A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence, 39 B.U. L. Rev. 321 (1959). For a general statement see 9 J. Wigmore, Evidence, sec. 2484 (3d ed. 1910), at 266-70:

> ...general judicial power itself, expressly allotted in every State constitution, implies inherently a power to investigate as auxiliary to the power to decide.

Id. at 267.

44. For scholarly discussions of this thesis see B. Bloom, A. Davis & R. Hess, Compensatory Education for Cultural Deprivation (1965); M. Deutsch, The Disadvantaged Child and the Learning Process (1962); Mackler & Giddings, Cultural Deprivation: A Study in Mythology, 66 Teachers Coll. Rec. 608 (1965); F. Reissman, The Culturally Deprived Child (1962).

45. For interesting and well documented histories of this amendment see Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955), Selected Essays on Constitutional Law 853 (1963); Harris, The Constitution, Education, and Segregation, 29 Temp. L.Q. 409 (1956); Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 Colum. L. Rev. 131 (1950).

46. Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J.,dissenting).

47. This interpretation is offered in R. E. Cushman & R. F. Cushman, Cases in Constitutional Law 781 (2d ed. 1963); H. Lazer, The American Political System in Transition 207 (1967).

48. Sweatt v. Painter, 339 U.S. 629 (1950).

49. Though regularly licensed teachers are assigned to schools by the central Bureau of Personnel of the Board of Education according to (a) residing borough, (b) academic specialty and need, and (c) the ratio of regularly licensed to substitute teachers throughout the system, teachers effectively evade teaching in schools in which they do not want to teach. This is done by not appearing at the assigned locations (and waiting for more desirable appointments), and by circumventing the central Bureau of Personnel by obtaining assignments directly from principals; or by being retained by principals after practice teaching in the schools, or after changing from substitute to regular licenses. See Mayor's Advisory Panel on Decentralization of the New York City Schools, Reconnection for Learning: A Community School System for New York City 49-50, 111 (Ford Foundation 1967); this is popularly known as the "Bundy Report."

50. Rice v. Elmore, 165 F. 2d 387, cert. denied, 333 U.S. 875 (1948).

51. The amendment states:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by

any state on account of race, color, or previous condition of servitude.

U.S. Const. amend. XV, sec. 1.

52. Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 532-533, 538-542, 87 N.E. 2d 541, 551-557 (1949) (Fuld, J., dissenting), cert. denied, 339 U.S. 981 (1950).

53. In recent years the federal courts including the U.S. Supreme Court have expanded the concept of state action so that it is no longer limited to legislative enactments, but instead resembles the dissenting opinion in Dorsey. State action now applies to a motel which received urban redevelopment funds, Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M.D. Tenn. 1963); to a restaurant which has a lease in a building financed and owned by a state agency, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); and to an amusement park which is policed by a deputy sheriff, Griffin v. Maryland, 378 U.S. 130 (1964). The Supreme Court has also ruled that a state can not take affirmative action designed to make private discrimination legally possible, Reitman v. Mulkey, 387 U.S. 369 (1967) (amendment to state constitution establishing absolute discretion of sellers on housing market). For scholarly discussion of this broader application of state action, see Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963); Lewis, Burton v. Wilmington Parking Authority--A Case Without Precedent, 61 Colum. L. Rev. 1458 (1961).

54. Nixon v. Condon, 286 U.S. 73, 88 (1932).

55. The principle that failure of a government to act can be a constitutional violation under the 14th amendment was established in Smith v. Illinois Bell Telephone Company, 270 U.S. 587 (1926) (failure of a state utility commission to prevent confiscatory telephone rates from taking effect).

56. Brown v. Board of Education, 349 U.S. 294 (1955), enforcing 347 U.S. 483 (1954).

57. For critical appraisal of this formula see Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification, 63 Colum. L. Rev. 1163 (1963).

58. Jaffe v. Board of Education of City of New York, 265 N.Y. 160, 192 N.E. 185 (1934).

59. O'Reilly v. Grumet, 284 App. Div. 440, 131 N.Y.S. 2d 521, aff'd, 308 N.Y. 351, 126 N.E. 2d 275 (1954).

60. Borders v. Rippy, 247 F. 2d 268, 271, 250 F. 2d 690, 692-693 (5th Cir. 1957).

61. Davis v. Board of Education of City of New York, 263 App. Div. 369, 371, 33 N.Y.S. 2d 311, 313-314, modified and aff'd, 288 N.Y. 330, 43 N.E. 2d 67 (1942).

62. For further discussion of moral convictions, power, and law see generally J. Stone, Social Dimensions of Law and Justice, especially ch. 13 (1966).

63. Though civil disobedience is not new to American society, its application in the civil rights movement has taken primarily the forms of sit-ins and mass demonstrations against ethnically segregated public accommodations in Southern communities. For an analysis of the judicial attitudes toward these styles of protest see Marek, Civil Disobedience in the Civil Rights Movement: To What Extent Protected and Sanctioned? in De Facto Segregation and Civil Rights: Struggle for Legal and Social Equality 311-324 (O. Schroeder & D. Smith eds. 1965). And in another article, it has been argued that civil disobedience occurs when laws are violated and claims for redress in the courts are not made. According to this legal formula very few acts of civil disobedience have occurred in the civil rights movement. The author asserts that Skipwith did not involve civil disobedience since the constitutional claims of the parents were held by the court to be a valid defense for their violation of the compulsory attendance law. See Taylor, Civil Disobedience: Observations on the Strategies of Protest, in Legal Aspects of the Civil Rights Movement 227-235, 232 (D. King & C. Quick eds. 1965).

64. For a detailed description and history of the Children's Court see W. Gellhorn, J. Hyman, & S. Asch, Children and Families in the Courts of New York City (1954) [hereinafter cited as Gellhorn].

65. Judge Polier, daughter of the well-known early twentieth century social and religious reformer, Rabbi Stephen S. Wise, came to the bench in 1935 during the fusion administration of Mayor LaGuardia. She was the first woman in the state to hold judicial office higher than that of magistrate. Prior to her initial ten-year term in the Children's Court, Judge Polier had been active in several diverse endeavors. These included union organizing and textile mill employment in New Jersey, graduation from both Barnard College and Yale Law School, editorship of the Yale Law Journal, first woman referee in the workmen's compensation unit of the New York State Department of Labor, and legal counselor to both the New Deal and LaGuardia administrations on issues of public health and welfare. In her twenty-seven years on the bench Judge Polier has become one of the Court's more experienced and respected members. (Since 1962, the Judge has been in the family division of the Domestic Relations Court.) According to the Citizen's Union of New York, Judge Polier has "served with exceptional usefulness to the public." In this same letter to Mayor Wagner, urging her reappointment, the Judge is described as being one of the "foremost leaders in the introduction of modern methods in the handling of domestic problems and problems of children." (A copy of this letter, dated August 8, 1955, is in the Polier file in the Citizen's Union office). Judge Polier's related activities have included writing two books and representing the state at numerous conferences, including the White House Conference of 1955 on

needs in public education. In the study of the Children's Court by the Association of the Bar of the City of New York, Judge Polier was also cited as being one of the Court's most experienced members. Gellhorn, at 85.

66. For an adjudication which held that adequate review, at least in matters not concerning constitutional issues, is provided through the commissioner of education, see Liebman v. Van Denburg, 168 Misc. 155, 6 N.Y.S. 2d 428 (Sup. Ct. 1938).

67. See notes 29 and 31, supra.

68. See note 36, supra.

69. See note 37, supra.

70. For more recent judicial attitudes see note 38, supra.

71. The relationship of both teacher education and licensing to competent teaching is highly controversial among education theorists. See W. Beggs, The Education of Teachers 58-61 (1965); J. Conant, The Education of American Teachers 8-14 (1963); J. Koerner, The Miseducation of American Teachers 207-209 (1963). For a provocative hypothesis that the certification process attracts people who are primarily interested in job security and not in child learning, see E. Friedenberg, The Dignity of Youth and Other Atavisms 119 (1965).

72. See p. 28, supra.

73. N.Y. Times, Jan.28, 1959, at 33, col. 1.

74. For a digest of Skipwith which argues along these lines, see 107 U. Pa. L. Rev. 1053, 1061 (1959).

75. It has been noted by reliable authorities that in low-income communities occasionally a school may not be fully staffed. See Mayor's Advisory Panel on Decentralization of the New York City Schools, Reconnection for Learning: A Community School System for New York City 49 (Ford Foundation 1967). In a newspaper dispatch which appeared less than a year after the decision, it was noted that a child in one school had as many as five teachers in the same school year. N.Y. Times, Aug. 30, 1959, at 1, col. 3.

76. Dobbins v. Commonwealth, note 33, supra.

77. Several sociological theories exist on the nature of bureaucratic inhibitions. See Merton, The Unanticipated Consequences of Purposive Social Action, 1 Am. Soc. Rev. 894 (1936); C. Barnard, The Functions of the Executive 158 (1938); Gouldner, Metaphysical Pathos and the Theory of Bureaucracy, 49 Am. Pol. Sci. Rev. 496 (1955). For a discussion of the New York City Board of Education's organized clientele in the late fifties see W. Sayre & H. Kaufman, Governing New York City: Politics in the Metropolis 279-85, 423-28 (1960).

78. Application of Lombardo, 37 Misc. 2d 436, 439, 235 N.Y.S. 2d 1010, 1013-1014 (1962).

79. Hobson v. Hansen, 269 F. Supp. 401, 498 (D.D.C. 1967). This contribution of Skipwith is also mentioned in Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 604-05 (1965); Carter, De Facto School Segregation: An Examination of the Legal and Constitutional Questions, in De Facto Segregation and Civil Rights: Struggle for Legal and Social Equality 28, 56 (O. Schroeder & D. Smith eds. 1965).

80. Hobson v. Hansen, 269 F. Supp. 401, 502 (D.D.C. 1967).

81. Sweatt v. Painter, note 48, supra.

82. Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U. L. J. 228, 235 (1963); T. Emerson, D. Haber, & N. Dorsen, Political and Civil Rights in the United States 1780 (3d ed. 1967); digest of Skipwith in 23 Albany L. Rev. 412, 415-16 (1959).

83. United States Comm'n on Civil Rights, Public Education: 1963 Staff Report 68 (1963); 1 id., Racial Isolation in the Public Schools 261 (1967); Sedler, loc. cit., 228, 236-37.

84. Sedler, loc. cit., 228, 237; note 79, supra.

85. This explanation has been given to the authors by Paul B. Zuber, attorney for the parents, and Bernice Skipwith, Stanley Skipwith, and Shirley Rector, in the course of informant interviews concerning this case. The respondents said that

after the decision a "mutual agreement," a "compromise," was reached between them and the Board. The children were allowed to attend an integrated school that was out of the district, and one that was a pilot project in the Board of Education's Higher Horizons Program. The parents were satisfied with the education that their children would receive there, and the Board, according to these respondents, was also satisfied in having the children attend school again.

86. For example, within two months of the decision a deputy superintendent of schools announced that already assigned and experienced teachers would not be transferred. N.Y. Times, Feb. 25, 1959, at 23, col. 4. According to previously unpublished school board tabulations, as late as 1964, unequal staffing conditions still existed. E. Sheldon & R. Glazier, Pupils and Schools in New York City: A Fact Book 135 (1965). As recently as the fall of 1967, the superintendent of schools, noting the shortage of teachers in disadvantaged schools, stated that, because of continued opposition from the teachers' union, no compulsory teacher assignments would be made. N.Y. Post, Oct. 24, 1967, at 4, col. 1.

87. For a general theoretical discussion of the sanctioning process of law see Lasswell & Arens, The Role of Sanction in Conflict Resolution, 11 J. of Conflict Resolution 27 (1967).

88. This general interpretation is offered also in McKay, Constitutional Law, 34 N.Y.U.L. Rev. 1359, 1368-69 (1959).

89. The date when the study phase began is noted in a joint statement made in August 1960 by the president of the Board of Education and the superintendent of schools. New York City Board of Education, The Open Enrollment Program in New York City Public Schools: Progress Report September 1960-September 1963, at 2 (mimeographed n.d.).

90. Id. at 1-2.

91. Id. at 23-24.

92. In our interviews with former school administrators and the parents in the original litigation, Skipwith was consistently mentioned as being instrumental in bringing about this program. And in our own investigation, we find a linkage between Skipwith and the transfer program. See pp. 43-49.

93. N.Y. Times, Jan. 6, 1959, at 30, col. 6.

94. N.Y. Times, Jan. 14, 1959, at 21, col. 1. Interestingly enough, a few days earlier the superintendent of schools had used Skipwith to help justify a half-a-billion-dollar bond issue for school construction. N.Y. Times, Jan. 11, 1959, at 76, col. 1.

95. N.Y. Times, Jan. 28, 1959, at 33, col. 1.

96. N.Y. Times, Feb. 8, 1959, at 81, col. 3; Id., Jan. 30, 1959, at 16, col. 3.

97. N.Y. Times, Feb. 11, 1959, at 31, col. 3.

98. N.Y. Times, Feb. 25, 1959, at 23, col. 4.

99. N.Y. Times, Feb. 12, 1959, at 55, col. 5; Id., Feb. 19, 1959, at 18, col. 8.

100. N.Y. Times, Feb. 27, 1959, at 16, col. 4.

101. Peter J. Flanagan, counsel for the Board, said in an interview with the authors that, though he made preparations to appeal the decision and filed notice of appeal, he never received authority to prosecute the appeal. Even if an appeal had been prosecuted, it would seem that the parents may also have been prepared. Shortly after the December decision, legal and financial assistance had been offered Zuber by Thurgood Marshall, Chief Counsel of the NAACP Legal Defense and Educational Fund [Appointed to the U.S. Supreme Court in 1967]. N.Y. Amsterdam News, Dec. 20, 1958, at 1, col. 6.

102. In our interviews with Shirley Rector, she noted that in the fall of 1959 her daughter was entering junior high school and that she helped organize and head this second boycott. A month before the schools opened, the NAACP had announced plans to submit to the Board names of 1,610 students for transfer out of overcrowded facilities. N.Y. Times, Aug. 30, 1959, at 1, col. 3; Id., Sept. 11, 1959, at 1, col. 5.

103. N.Y. Times, Sept. 11, 1959, at 1, col. 5; Id., Sept. 12, 1959, at 23, col. 1.

104. N.Y. Times, Sept. 16, 1959, at 1, col. 2.

105. N.Y. Times, Sept. 22, 1959, at 42, col. 3.

106. N.Y. Times, Nov. 21, 1959, at 23, col. 1. The minutes of the trial are on file in the Court.

107. N.Y. Times, Dec. 23, 1959, at 21, col. 6.

108. No doubt tiring of the boycott, it was announced that a few parents made other arrangements for schooling their children. N.Y. Times, Dec. 23, 1959, at 21, col. 6. This seems to be plausible because parents at that time easily avoided the overcrowded public schools by sending their children to private schools, or by falsifying home addresses in order to register at public schools outside their districts. N.Y. Times, Aug. 30, 1959, at 1, col. 3.

109. N.Y. Times, Jan. 14, 1960, at 12, col. 6; Id., Feb. 25, 1960, at 21, col. 6.

110. N.Y. Times, Mar. 3, 1960, at 15, col. 2; Id., Mar. 4, 1960, at 16, col. 4.

111. N.Y. Times, Sept. 16, 1959, at 1, col. 2.

112. For an indication of the public mood, a newspaper editorial written during this period emphasized the white boycott, but was nonetheless critical of the Harlem action as well. N.Y. Times, Sept. 16, 1959, at 38. In early October, a

county court, contrary to the hopes of the white parents, refused to annul the decision of the Board of Education to integrate a local school. See Matter of Anderson, 19 Misc. 2d 873 (Sup. Ct. 1959).

113. N.Y. Times, Sept. 12, 1960, at 1. col. 7. The actual number of students registered in white junior high schools during this first year was 343; and for all of the Manhattan Borough, which includes the Harlem community, less than one hundred and fifty pupils were registered. New York City Board of Education, The Open Enrollment Program in New York City Public Schools: Progress Report September 1960-September 1963, at 24 (mimeographed n.d.).

114. This is noted in Kaplan, Segregation Litigation and the Schools--Part I: The New Rochelle Experience, 58 Nw. U.L. Rev. 1, 10 (1963). The case is Taylor v. Board of Ed. of City School Dist. of City of New Rochelle, note 38, supra.

115. For a description of the New Rochelle case and its extra-legal effects see the general introduction and report by Professor Kaplan in United States Comm'n on Civil Rights, U.S.A.: Public Schools, Cities in the North and West, 1962, at 1, 33-103 (1962).